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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/851,456	05/08/2001	Stephen Paul Zimmerman	8074M	3630

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EXAMINER

BECKER, DREW E

ART UNIT	PAPER NUMBER
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1761

DATE MAILED: 01/07/2005

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary

Application No.

09/851,456

Applicant(s)

ZIMMERMAN ET AL.

Examiner

Drew E Becker

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-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --
Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 18 October 2004.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1-13, 15-18, 22 and 23 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 1-13, 15-18, 22 and 23 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
- ☐ Certified copies of the priority documents have been received.
 - ☐ Certified copies of the priority documents have been received in Application No. _____.
 - ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- ☒ Notice of References Cited (PTO-892)
- ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- ☒ Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)
Paper No(s)/Mail Date 10/3/2001.
- ☐ Interview Summary (PTO-413)
Paper No(s)/Mail Date. _____
- ☐ Notice of Informal Patent Application (PTO-152)
- ☐ Other: _____

DETAILED ACTION

Response to Appeal Brief

1. In view of the Appeal Brief filed on October 18, 2004, PROSECUTION IS HEREBY REOPENED. A new ground of rejection is set forth below. Any inconvenience is sincerely regretted.

To avoid abandonment of the application, appellant must exercise one of the following two options:

- (1) file a reply under 37 CFR 1.111 (if this Office action is non-final) or a reply under 37 CFR 1.113 (if this Office action is final); or,
- (2) request reinstatement of the appeal.

If reinstatement of the appeal is requested, such request must be accompanied by a supplemental appeal brief, but no new amendments, affidavits (37 CFR 1.130, 1.131 or 1.132) or other evidence are permitted. See 37 CFR 1.193(b)(2).

Information Disclosure Statement

2. The information disclosure statement filed October 3, 2001 will be considered and the respective dates of the samples will be assumed to be at least before the filing date of applicant's provisional application as disclosed by applicant on page 4 of the Appeal Brief filed October 18, 2004. Also, a date of 1994 has been assigned to the Fritos Scoops Corn Chips. The examiner called the phone number printed on the bag, and was promptly given this information.

Claim Rejections - 35 USC § 112

3. The following is a quotation of the first paragraph of 35 U.S.C. 112:

The specification shall contain a written description of the invention, and of the manner and process of making and using it, in such full, clear, concise, and exact terms as to enable any person skilled in the art to which it pertains, or with which it is most nearly connected, to make and use the same and shall set forth the best mode contemplated by the inventor of carrying out his invention.

4. Claim 22 is rejected under 35 U.S.C. 112, first paragraph, as containing subject matter which was not described in the specification in such a way as to enable one skilled in the art to which it pertains, or with which it is most nearly connected, to make and/or use the invention. Claim 22 refers to an “engagement span”. However, the specification does not describe what an engagement span is, or how it would be found. Although an “engagement span” is mentioned on page 9, line 22 of the specification, it is not clear how it was calculated. Page 9 merely recites “The engagement span (ES) is about 90% of the vertex span, more preferably about 70%, most preferably 50% as shown in Figures 3a through 3d.” It does not disclose how or when one of these would be chosen. It does not disclose how one would create a snack piece possessing an “engagement span engagement span measurable at no more than about 90% of the vertical span” since it is not clear what an engagement span is.

5. The following is a quotation of the second paragraph of 35 U.S.C. 112:

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

6. Claim 22 is rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

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7. Claim 22 recites an “engagement span”. It is not clear what an “engagement span” is, or how it is calculated. It is not clear what purpose the “engagement span” fills, or what its intended use is. What does it “engage”?

Since the examiner is unable to discern any particular meaning for this term, and to speed along prosecution, it shall be given its broadest reasonable interpretation when reviewing the prior art. The broadest reasonable interpretation is a “span”, or distance, upon which a dip or condiment may be held by the snack piece.

Claim Rejections - 35 USC § 102

8. The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

(e) the invention was described in (1) an application for patent, published under section 122(b), by another filed in the United States before the invention by the applicant for patent or (2) a patent granted on an application for patent by another filed in the United States before the invention by the applicant for patent, except that an international application filed under the treaty defined in section 351(a) shall have the effects for purposes of this subsection of an application filed in the United States only if the international application designated the United States and was published under Article 21(2) of such treaty in the English language.

9. Claims 1-4, 9, 12, 16-17, and 22 are rejected under 35 U.S.C. 102(b) as being anticipated by Hreschak [Des. 212,070].

Hreschak teaches a snack product comprising a body curved about a first axis thus forming a dip containment region with an open end, sides which are not parallel to the axis, restriction of movement to the sides and rear, an engagement span which is 90% of the vertical span, the axis being perpendicular to the open end, sidewalls, a restricted

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end which is less than 75% of the open end width, a vertical taper of less than 45°, and a varying radius of curvature along its length (Figures 1-4). Regarding "stackable", this was an inherent property of the Hreschak product because it certainly was capable of being stacked, for instance in a random pile.

10. Claims 1-7, 9, 11-13, 15-18, and 22-23 are rejected under 35 U.S.C. 102(b) as being anticipated by Smietana [Pat. No. 4,915,964].

Smietana teaches a stackable snack piece comprising a body curved about a first axis, the curvature forming a dip containment region which restricts the dip in at least two directions, an open end perpendicular to the axis, a restricted end which restricts flow when tilted past 0°, the axis not being parallel to a side, a vertical span, sidewalls, a isosceles triangular shape, a vertical taper of 0-45°, the restricted end being less than 75% the width of the open end, a segment of a right cone, an engagement span less than 90% of the vertical span (Figure 21), a nested arrangement (Figure 7), a varying radius of curvature of 0.1-38.1 mm (column 6, line 70), and a width of approximately 75 mm (column 6, line 70).

11. Claims 1-4, 9, 12, and 22 are rejected under 35 U.S.C. 102(b) as being anticipated by Morales [Des. 383,589].

Morales teaches a stackable snack piece comprising a body curved about a first axis, a dip containment region, an open end perpendicular to the axis, a restricted end which restricts flow when tilted past 0°, a vertical span, sidewalls, a vertical taper between 0 and 45°, and an engagement span less than 90% the vertical span (Figure 1).

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Regarding "stackable", this was an inherent property of the Morales product because it certainly was capable of being stacked, for instance in a random pile.

12. Claims 1-4, 9, 12, and 22 are rejected under 35 U.S.C. 102(e) as being anticipated by Tirillo [Pat. No. 5,997,921].

Tirillo teaches a stackable snack piece comprising a body curved about a first axis, a dip containment region, an open end perpendicular to the axis, a restricted end which restricts flow when tilted past 0°, a vertical span, sidewalls, a vertical taper between 0 and 45°, and an engagement span less than 90% the vertical span (Figure 1).

Regarding "stackable", this was an inherent property of the Tirillo product because it certainly was capable of being stacked, for instance in a random pile.

13. Claims 1-4, 9, 17, and 22 are rejected under 35 U.S.C. 102(b) as being anticipated by Khan et al [Pat. No. 382,385].

Khan et al teach a stackable snack piece comprising a body curved about a first axis, a dip containment region, an open end perpendicular to the axis, a restricted end which restricts flow when tilted past 0°, a vertical span, sidewalls, a varying radius of curvature, and an engagement span less than 90% the vertical span (Figure 1).

Regarding "stackable", this was an inherent property of the Khan et al product because it certainly was capable of being stacked, for instance in a random pile.

Claim Rejections - 35 USC § 103

14. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

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(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

15. Claims 10-11 and 15 are rejected under 35 U.S.C. 103(a) as being unpatentable over Hreschak in view of Fritos Scoops Corn Chips [applicant's admitted prior art provided in the IDS of October 3, 2001].

Hreschak teaches the above mentioned components. Hreschak does not mention any particular dimensions, specifically a length of 30-110mm, a radius of curvature of 15-500mm, or an open end width of 15-75mm. Fritos teaches a curved snack piece having a length of about 50 mm, a width of about 35 mm, and a radius of curvature of between 15-500 mm. It would have been obvious to one of ordinary skill in the art to incorporate the scale of Fritos into the product of Hreschak since both are directed to snack pieces, since Hreschak simply does not mention particular dimensions due to its being a design patent, since consumers preferred snack foods of this size as the snack foods fit into their hands more easily, and since the mere scaling up or down of the snack piece of Hreschak would have been done during the course of normal experimentation and optimization procedures.

16. Claims 5-7 and 23 are rejected under 35 U.S.C. 103(a) as being unpatentable over Hreschak as applied above, in view of Blish [Des. 166,524].

Hreschak teaches the above mentioned components. Hreschak does not teach an isosceles triangle shape. Blish teaches a food product with a dip containment region and an isosceles triangle shape (Figures 1-3). It would have been obvious to one of ordinary skill in the art to incorporate the shape of Blish into the food product of

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Hreschak since both are directed to scoop shaped foods, since Hreschak already had a generally triangular shape (Figure 1), and since an isosceles triangle shape was commonly used for snack food products as shown by Blish (Figures 1-3).

17. Claim 18 is rejected under 35 U.S.C. 103(a) as being unpatentable over Hreschak as applied above, in view of Ipema [Des. 300,199].

Hreschak teaches the above mentioned components. Hreschak does not teach a segment of a right cone. Ipema teaches a scoop in the shape of a segment of a right cone (Figures 1-4). It would have been obvious to one of ordinary skill in the art to incorporate the shape of Ipema into the product of Hreschak since both are directed to scooping products, since Hreschak already included sidewalls and a curved scoop region (Figures 1-4), and since scoops commonly had the shape of a segment of a right cone, as shown by Ipema (Figures 1-4).

18. Claim 8 is rejected under 35 U.S.C. 103(a) as being unpatentable over Hreschak as applied above, in view of Bierschenk et al.

Hreschak teaches the above mentioned components. Hreschak does not teach an equilateral triangle shape. Bierschenk et al teach a snack piece with an equilateral triangle shape (Figure 1). It would have been obvious to one of ordinary skill in the art to incorporate the shape of Bierschenk et al into the snack product of Hreschak since both are directed to snack foods, since Hreschak already had a generally triangular shape (Figure 1), and since an equilateral triangle shape was commonly used for snack food products as shown by Bierschenk et al (Figure 1).

Response to Arguments

19. Applicant's arguments with respect to claims 1-13, 15-18, and 22-23 have been considered but are moot in view of the new ground(s) of rejection.

Regarding the 112(1) rejection, appellants argue that "engagement span" was adequately described. However, the specification does not describe what an engagement span is, or how it is calculated. Although an "engagement span" is mentioned on page 9, line 22 of the specification, it is not clear how it was calculated. Page 9 merely recites "The engagement span (ES) is about 90% of the vertex span, more preferably about 70%, most preferably 50% as shown in Figures 3a through 3d." without disclosing how one of these would be chosen, or how it would be calculated. Although a value has been given to the engagement span, it is not clear what the engagement span, or how it is calculated. Although examples of "engagement spans" are shown in the figures, it is not clear how they are calculated or how they would be identified. For examination purposes involving the prior art, the examiner has given "engagement span" its broadest reasonable interpretation, which in this case basically means a "span", or distance, upon which a dip or condiment could be held. All of the above references would be capable of holding a dip or condiment which was less than 90% of the height of the snack piece, thus meeting claim 22. Although this is a possible meaning, it is not clear whether this is the meaning used by appellant, thus necessitating the 112 rejections. It should be noted that appellant has not attempted to further explain the meaning of "engagement span" beyond the solitary sentence found

in the specification (page 9, line 21), which merely states that “The engagement span (ES) is about 90% of the vertex span, more preferably about 70%, most preferably 50% as shown in Figures 3a through 3d”.

Applicants argue that since the “engagement span” was rejected under 112(1-2) it could not also be found in the prior art references. However, with respect to the allegedly inconsistent rejections under 35 USC 112 and 35 USC 102 (or 103), the Examiner maintains that the test for adequacy of a prior art disclosure to anticipate or render claims obvious is not the same test as that for adequacy of a patent application disclosure to support claims under 35 USC 112, as taught in In re Hafner, 161 USPQ 783, (CCPA 1969).

Regarding the 102(b) rejection of Hreschak, appellants argue that Hreschak was not “stackable”. However, the term “stackable” merely states a capability of the product, it is not a component or structure of the product. Regardless, nearly any snack product, including Hreschak, would be capable of being stacked in some manner, for instance in a pile.

Appellants appear to confuse the term “stackable” with the term “nestable” with regards to claim 1. The term “stackable” means the capability of being easily arranged in a stack, pile, or heap. The term “nestable” is defined in the art as the capability of being stacked wherein the articles interfit or mate together. Therefore, Hreschak was certainly capable of being stacked in a pile, or heap. Appellants also prove this point by reciting a “nested arrangement” in dependent claim 13.

In response to appellants' argument that the references fail to show certain features of applicant's invention, it is noted that the features upon which applicant relies (i.e., nesting of the snack piece in claim 1) are not recited in the rejected claim(s).

Although the claims are interpreted in light of the specification, limitations from the specification are not read into the claims. See *In re Van Geuns*, 988 F.2d 1181, 26 USPQ2d 1057 (Fed. Cir. 1993). "Nesting" of the snack-piece is addressed by Smietana.

Appellants argue that Hreschak does not teach an "engagement span". However, for examination purposes involving the prior art, the examiner has given "engagement span" its broadest reasonable interpretation, which in this case basically means a "span", or distance, upon which a dip or condiment could be held. All of the above references would be capable of holding a dip or condiment which was less than 90% of the height of the snack piece, thus meeting claim 22. Although this is one possible meaning, it is not clear whether this is the meaning used by appellant, thus necessitating the 112 rejections. Another possible meaning for "engagement span" is the width at its narrow end, which is no more than 90% of the vertical span as seen in Figures 1-4 of Hreschak. It should be noted that appellant has not attempted to further explain the meaning of "engagement span" beyond the solitary sentence found in the specification (page 9, line 21), which merely states that "The engagement span (ES) is about 90% of the vertex span, more preferably about 70%, most preferably 50% as shown in Figures 3a through 3d".

Regarding the 102(b) rejections of Smietana, appellants argue that Smietana restricts dip movement in only one direction. However, the cone shape of Smietana

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clearly restricts movement in many directions, for instance towards the closed end, downward, to either side, and upward, to name but a few.

Appellants appear to argue that a "direction" can be only toward one end, or the other. However, the claims do not recite this definition, and neither does the specification. Therefore, any direction can be used. The cone shape of Smietana clearly restricts movement in many directions, for instance towards the closed end, downward, to either side, and upward, to name but a few.

Appellants argue that Smietana does not teach an "engagement span". However, for examination purposes involving the prior art, the examiner has given "engagement span" its broadest reasonable interpretation, which in this case basically means a "span", or distance, upon which a dip or condiment could be held. All of the above references would be capable of holding a dip or condiment which was less than 90% of the height of the snack piece, thus meeting claim 22. Although this is a possible meaning, it is not clear whether this is the meaning used by appellant, thus necessitating the 112 rejections. Another possible meaning for "engagement span" is the width at its narrow end, which is no more than 90% of the vertical span as seen in Figure 1 of Smietana. It should be noted that appellant has not attempted to further explain the meaning of "engagement span" beyond the solitary sentence found in the specification (page 9, line 21), which merely states that "The engagement span (ES) is about 90% of the vertex span, more preferably about 70%, most preferably 50% as shown in Figures 3a through 3d".

Regarding the 102(b) rejection of Morales, appellants argue that "stackable" should have been given weight. However, in response to applicant's arguments, the recitation "stackable" has not been given patentable weight because the recitation occurs in the preamble. A preamble is generally not accorded any patentable weight where it merely recites the purpose of a process or the intended use of a structure, and where the body of the claim does not depend on the preamble for completeness but, instead, the process steps or structural limitations are able to stand alone. See *In re Hirao*, 535 F.2d 67, 190 USPQ 15 (CCPA 1976) and *Kropa v. Robie*, 187 F.2d 150, 152, 88 USPQ 478, 481 (CCPA 1951). The term "stackable" merely states a capability of the product, it is not a component or structure of the product. Regardless, nearly any snack product, including Morales, would be capable of being stacked in some manner, for instance in a pile.

Appellants argue that Morales does not teach an "engagement span". However, for examination purposes involving the prior art, the examiner has given "engagement span" its broadest reasonable interpretation, which in this case basically means a "span", or distance, upon which a dip or condiment could be held. All of the above references would be capable of holding a dip or condiment which was less than 90% of the height of the snack piece, thus meeting claim 22. Although this is a possible meaning, it is not clear whether this is the meaning used by appellant, thus necessitating the 112 rejections. Another possible meaning for "engagement span" is the width at its narrow end, which is no more than 90% of the vertical span as seen in Figure 1 of Morales. It should be noted that appellant has not attempted to further

explain the meaning of “engagement span” beyond the solitary sentence found in the specification (page 9, line 21), which merely states that “The engagement span (ES) is about 90% of the vertex span, more preferably about 70%, most preferably 50% as shown in Figures 3a through 3d”.

Regarding the 102(b) rejection of Tirillo, appellants argue that Tirillo does not teach an “engagement span”. However, for examination purposes involving the prior art, the examiner has given “engagement span” its broadest reasonable interpretation, which in this case basically means a “span”, or distance, upon which a dip or condiment could be held. All of the above references would be capable of holding a dip or condiment which was less than 90% of the height of the snack piece, thus meeting claim 22. Although this is a possible meaning, it is not clear whether this is the meaning used by appellant, thus necessitating the 112 rejections. Another possible meaning for “engagement span” is the width at its narrow end, which is no more than 90% of the vertical span as seen in Figure 1 of Tirillo. It should be noted that appellant has not attempted to further explain the meaning of “engagement span” beyond the solitary sentence found in the specification (page 9, line 21), which merely states that “The engagement span (ES) is about 90% of the vertex span, more preferably about 70%, most preferably 50% as shown in Figures 3a through 3d”.

It should be noted that “engagement span” is included only in dependent claim 22. Apparently, appellants concede the fact that Tirillo meets all the claim limitations of claims 1-4, 9, and 12.

Regarding the 103(a) rejection of Hreschak, appellants argue that Hreschak does not include a body curved about a first axis. However, Figure 3 of Hreschak clearly illustrate a snack piece with a body curved about a first axis (the lower edge). In response to applicant's argument that the references fail to show certain features of applicant's invention, it is noted that the features upon which applicant relies (i.e., a continuous radius of curvature along the entire width of the snackpiece) are not recited in the rejected claim(s). Although the claims are interpreted in light of the specification, limitations from the specification are not read into the claims. See *In re Van Geuns*, 988 F.2d 1181, 26 USPQ2d 1057 (Fed. Cir. 1993).

Regarding changes in shape, appellants' attention is brought to *In re Dailey*, 357 F.2d 669, 149 USPQ 47 (CCPA 1966) (The court held that the configuration of the claimed disposable plastic nursing container was a matter of choice which a person of ordinary skill in the art would have found obvious absent persuasive evidence that the particular configuration of the claimed container was significant.).

Appellants argue that Hreschak did not teach a "dip containment region". However, a "dip containment region" is clearly visible in Figures 1-4. Dip could easily be held at the restricted end of the snackpiece of Hreschak.

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Regarding the 103(a) rejection of Hreschak in view of Blish, appellants argue that Hreschak was not "stackable". However, in response to applicant's arguments, the recitation "stackable" has not been given patentable weight because the recitation occurs in the preamble. A preamble is generally not accorded any patentable weight where it merely recites the purpose of a process or the intended use of a structure, and where the body of the claim does not depend on the preamble for completeness but, instead, the process steps or structural limitations are able to stand alone. See *In re Hirao*, 535 F.2d 67, 190 USPQ 15 (CCPA 1976) and *Kropa v. Robie*, 187 F.2d 150, 152, 88 USPQ 478, 481 (CCPA 1951). The term "stackable" merely states a capability of the product, it is not a component or structure of the product. Regardless, nearly any snack product, including Hreschak, would be capable of being stacked in some manner, for instance in a pile.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Drew E Becker whose telephone number is 571-272-1396. The examiner can normally be reached on Mon.-Thur. 8am-6pm.


If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Milton Cano can be reached on 571-272-1398. The fax phone number for the organization where this application or proceeding is assigned is 703-872-9306.

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Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).


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PRIMARY EXAMINER
1-6-09

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